BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TROY D. POPIELARZ	)	
Claimant	)	
	)	
VS.	)	
	)	
VENTURE CORPORATION	)	
Respondent	)	Docket No. 1,054,453
	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the July 11, 2011, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Brianne Niemann, of Kansas City, Missouri, appeared for claimant. Vincent Burnett, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that the evidence failed to establish that claimant's alleged fall on July 1, 2010, more probably than not caused the fractured plate in his hip. Further, the ALJ found claimant failed to prove he suffered personal injury by accident that arose out of and in the course of his employment on July 1, 2010. Last, the ALJ held that claimant failed to sustain his burden of proof that he gave respondent timely notice of a July 1, 2010, accident.

The record on appeal is the same as that considered by the ALJ and consists of the discovery deposition of Troy Popielarz taken April 5, 2011; the transcript of the April 6, 2011, Preliminary Hearing and the exhibits; the deposition of Brad Herrman taken June 9, 2011; the deposition of Nancy Zeilinger taken June 9, 2011, and the exhibits; the deposition of Adam Parsons taken June 10, 2011; and the deposition of Hector Sanchez taken June 10, 2011, and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's findings that claimant did not sustain his burden of proof that he suffered personal injury by accident that arose out of and in the course of his employment with respondent on July 1, 2010, and that he did not give timely notice of that accident.

Respondent argues that the Board lacks jurisdiction over this appeal because the claimant's application for review was filed out of time. Respondent also contends that claimant did not sustain an accident at work and that claimant's current need for medical treatment was not caused by an accident at work but from a preexisting injury. Respondent further asserts that the Board should affirm the ALJ's rejection of claimant's unreliable testimony. Last, respondent contends claimant failed to provide respondent with timely notice of his accident.

The issues for the Board's review are:

(1) Did claimant file his application for review of the ALJ's July 11, 2011, order out of time?

(2) Did claimant sustain an accidental injury that arose out of and in the course of his employment on July 1, 2010? If so, is claimant's current need for medical treatment a result of his accidental injury on July 1, 2010?

(3) Did claimant give respondent timely notice of his alleged accident?

FINDINGS OF FACT

Claimant was involved in a motorcycle accident in 2001 that resulted in a fusion of his left hip in 2003, at which time a metal plate was placed in his hip. The surgery was performed by Dr. James Goulet in Michigan. After the fusion, claimant walked with a pronounced limp. He continued to be treated by Dr. Goulet. On March 6, 2007, claimant was seen by Dr. Goulet, complaining of significant pain in his left buttocks and groin. Dr. Goulet's notes indicate:

> "Radiographs of his pelvis reveal intact hardware with no evidence of loosening or failure. The fusion appears intact to the medial aspect of the femoral head and acetabulum, although laterally there continues to be a lucid line, but it is hard to determine on plain radiographs whether there is a solid union or not.
> Assessment and Plan: A 38-year-old male status post left hip arthrodesis with continued pain. We would like to evaluate the arthrodesis site with a CT to confirm union. It was discussed with him that if this is in fact a nonunion we could proceed with the revision arthrodesis versus a total hip arthroplasty. . . ."

Claimant went on social security disability in 2003. He started working for respondent on June 21, 2010, as a road foreman. He was still on social security disability, but he was able to work through a program called "Ticket to Work," in which he was able to work and still maintain his income through Social Security.

On July 1, 2010, claimant was working for respondent in Great Bend, Kansas. Claimant said he was standing on the ladder of a paver that was being operated by Hector Sanchez. The machine had finished laying asphalt on half a road, and Mr. Sanchez was backing up the machine to start paving the second half. Claimant said even though the paving machine was being backed up at the time he fell, it was traveling at its maximum speed, which was about 6 miles per hour. He said Mr. Sanchez suddenly stopped the paving machine, and he lost his balance. He said his right leg somehow got caught up in the ladder rung and he twisted to the left and fell onto a catwalk, then fell off the catwalk to the ground. He contends he landed with his forearms in the freshly-laid asphalt[1] and the lower part of his body on gravel.

Claimant testified that his fall was seen by Mr. Parsons and that Mr. Parsons immediately came up to him and asked if he was all right. Claimant said that Mr. Parsons razzed him because the fall had caused an impression in the hot asphalt that needed to be repaired. Claimant said that throughout the course of the day, other coworkers knew he had fallen, including respondent's owner, Chris Spray. Claimant said Mr. Spray came to the work site later that day and asked him if he was all right, if he needed to go to the shop to clean up, and if he needed to see a doctor. Claimant said that he told Mr. Spray that he was sore but would be okay. Claimant stated that his left leg, back, and right knee were sore. He also claimed his forearms were severely burned when he fell in the asphalt and his arms were blistering. Claimant continued to work his shift that day and took no time off for medical treatment of his alleged injuries, even his burns. He said he keeps a first aid kit in the company truck, and he used some antiseptic wipes to clean himself.

Claimant's wife testified that her husband called her after his July 1, 2010, accident and told her about his fall and said he was in a lot of pain. She personally observed claimant's burns when he came home for the 4th of July holiday. Mrs. Popielarz also testified that when she cleaned out claimant's truck she discovered a large number of empty Tylenol and Motrin bottles.

Both Hector Sanchez and Adam Parsons testified. Mr. Sanchez testified that he did not see claimant fall off the paver and did not know of any accidents that occurred on July 1, 2010, in Great Bend. Mr. Parsons remembered a time when claimant said he fell off the paver. Mr. Parsons said that claimant blamed Mr. Sanchez for the fall. He testified he did not see claimant fall. He also said if claimant was standing on the ladder and fell, he

[1] Several witnesses, including claimant, testified that asphalt is heated to about 300 degrees when it is being laid.

probably would have noticed it. He did not see that claimant had any injuries, and there was no work stoppage because of an injury. He said claimant did not look or act hurt, never said he wanted to go to the hospital, and never told him he had been injured.

Claimant said he continued to work after the accident, although he struggled with pain and used over the counter medication. He said he had pain in his left hip, groin, back and right knee. The first time he saw a doctor was on July 26, 2010, when he saw his personal physician, Dr. Randy Curl. Under the section for "History of Present Illness," the records indicate:

> **1. depression**
> Onset: 7 year(s) ago. Date of initial visit for this episode: 07/26/2010. . . . .
> **2. pain**
> Onset: 9 Year(s) ago.
> Comments:
> Left hip pain, chronic; is s/p hip replacement following severe MVA on motorcycle vs deer. Taking one norco nightly.[2]

Claimant admitted he did not tell Dr. Curl about his July 1, 2010, accident when he saw Dr. Curl on July 26, 2010. Claimant denied he was still taking Norco at the time of the accident, stating he had not used narcotic pain medication since at least 2008. He said Dr. Curl had asked him about past medications, and that was where Dr. Curl got the information about his use of Norco, a medication he took after his fusion surgery. Dr. Curl's medical note of July 26 goes on to state that he gave claimant 14 Norco pills on that date, even though he normally did not prescribe medication on the first visit. Claimant was to return in two weeks but said he was unable to do so because of his work schedule.

On November 12, 2010, claimant was scheduled to see Dr. Thomas Corsolini for a disability medical evaluation for Social Security. Dr. Corsolini took x-rays of claimant's left hip and pelvis, and they showed a crack in the metal plate in claimant's hip. Claimant was unaware of the breakage until that date. Later that day, claimant again saw Dr. Curl. Claimant complained to Dr. Curl of left hip pain which he related to the motorcycle accident and which was aggravated by sitting, walking and standing. He also told Dr. Curl about the break in his metal plate and asked for a referral. Claimant admits he did not mention his July 1, 2010, accident to either Dr. Corsolini or Dr. Curl on November 12, even though he testified that he immediately related the broken plate to his fall off the paver.

Dr. Curl referred claimant to Dr. William Wester, an orthopedic surgeon, who told claimant he would have to be referred to a university. On January 6, 2011, claimant was seen by Dr. Goulet, who had performed the fusion surgery on his left hip in 2003. Dr. Goulet performed a left total hip arthroplasty on claimant on February 28, 2011. Later, claimant developed a staph infection and was treated at the University of Missouri, where

---

[2] P.H. Trans. (Apr. 6, 2011), Cl. Ex. 1 at 36.

he had another surgery. He was taken off work by Dr. Goulet and his restrictions prevent him from working. His medical treatment has been paid by Medicare and claimant himself. Presently, claimant has pain in his left hip, back, right knee, and groin. He has scars on his forearms which he contends were caused by the burns from the asphalt. He is currently on narcotic pain medication.

Nancy Zeilinger is respondent's Regulatory Affairs Specialist. She handles safety and workers compensation, as well as other regulatory matters. She said if an employee is injured on the job, she is to be notified immediately.

Although Ms. Zeilinger knew that claimant had an appointment on November 12 with Dr. Corsolini, she was not aware claimant was on social security disability and did not know that was the reason for the appointment. She testified that within a few days of the November 12 appointment, claimant called her and told her the plate in his hip was broken and had to be replaced. Claimant asked her about unemployment, and she informed him he would not be eligible. Then he asked about short-term disability, and she told him respondent did not have that benefit. Claimant then stated, "I guess I'm on my own, then."[3] During that conversation, claimant did not say he had injured himself on the job while working for respondent. Ms. Zeilinger did not know he was claiming an accident that caused an injury until December 29, 2010, when respondent received notification that claimant had filed a workers compensation claim in Missouri.[4]

After receiving notice of the workers compensation claim, Ms. Zeilinger investigated whether there was any work stoppage on July 1, 2010, the day claimant claimed injuries. She said if there had been an accident that resulted in injuries, there would have been a work stoppage. Also, if claimant had burned his forearms as he claimed, respondent would have sent him to a doctor because of the likelihood of infection caused by the burns. Ms. Zeilinger said that at no time between July 1, 2010, and November 11, 2010, claimant's last day at work, did he complain to her that he had been injured on the job at respondent. He never asked for an accident report to be filled out or for respondent to send him to a doctor. She admitted, however, that when she visited with Mr. Parsons about claimant, he told her that claimant fell.

Claimant was terminated by respondent on November 23, 2010, for unauthorized use of a company vehicle. Claimant stated on November 8, 2010, he had taken a company truck with the intention of driving back to his home in Missouri. He said that on the way, shortly after he had crossed over into Missouri, which he said was about 20 to 25 minutes away from the job site, he observed a spotlight and saw a deer being shot by poachers. He

---

[3] Zeilinger Depo. at 8.

[4] Claimant filed his Application for Hearing with the Kansas Workers Compensation Division on February 7, 2011. The disposition of the Missouri claim is unknown.

happened to have a Missouri deer license on him, and since the poachers did not follow the deer, he decided to tag the deer as his own. When he found the deer, it was still alive. And since it was a good-sized buck, he drove back to Erie, Kansas, to solicit help from his coworkers.

Claimant testified he asked Brad Herrman and Shawn Littrell to return to the site of the deer with him, telling them the deer was across the state line in Missouri. Claimant said his coworkers drove their own vehicle and followed him to the site. The deer was still alive when they got there, and Mr. Herrman, who had a knife, wanted to slit its throat to end its life quickly. But claimant wanted to have a cape in order to mount the deer and asked Mr. Herrman to stab the deer instead, so Mr. Herrman stabbed the deer. Claimant said the deer then jumped up and began to run, but Mr. Herrman stabbed it a second time. They then loaded the deer into the back of the company truck that claimant was driving, and claimant drove back to his home in Missouri, about 4 hours away, where he dressed the deer and put the meat in a cooler. Claimant then returned to the job site and worked on November 9, 10 and 11.

Mr. Herrman testified, giving a different version of the deer episode. He said he was in bed about 9 p.m. on November 8 when claimant knocked on the door of the motel room he shared with Shawn Littrell in Erie, Kansas. He said claimant told them he had shot a deer on the project[5] and wanted to know if they would help him load it up. Mr. Herrman said claimant was worked up and appeared to be intoxicated. Mr. Herrman and Mr. Littrell said they would help, but they drove their own vehicle because of claimant's apparent intoxication. Mr. Herrman testified that claimant stopped at a convenience store on the way out of town in order to purchase some beer. When they arrived at the site, they found the deer had been shot but was still alive. Mr. Herrman said that claimant jumped on top of the deer, grabbing its antlers and holding its head down. Although Mr. Herrman wanted to slit the deer's throat to put it out of its misery, claimant wanted to keep the cape intact. Mr. Herrman stabbed the deer, and the deer then jumped up, throwing claimant off and charging at claimant. The deer then took off. Mr. Herrman said claimant then grabbed a knife from his truck, chased after the deer and stabbed it. Mr. Herrman and Mr. Littrell then loaded the deer into the truck claimant was driving. Claimant did not help, as it appeared to Mr. Herrman that he was still intoxicated.

Claimant did not tell Mr. Herrman that the deer had been shot by someone other than himself. After the deer was loaded, claimant told Mr. Herrman he did not have a Kansas deer license. Since there was no question in Mr. Herrman's mind that they were in Kansas, he considered this to be poaching and left so he would not be part of it. Later, he told Ms. Zeilinger about the episode, and claimant was terminated.

---

[5] Mr. Herrman explained that by "on the project," he meant the area where the crew was laying asphalt, which was only a couple miles outside of Erie, Kansas, and was clearly in the state of Kansas. Mr. Herrman further testified that the Missouri state line was about an hour away, and he would not have traveled that far to help claimant load a deer. Herrman Depo. at 16-17.

PRINCIPLES OF LAW

K.A.R. 51-18-2 states in part:

> (a) The effective date of the administrative law judge's acts, findings, awards, decisions, rulings, or modifications, for review purposes, shall be the day following the date noted thereon by the administrative law judge.
>
> (b) Application for review by the workers compensation board shall be considered as timely filed only if received in the central office or one of the district offices of the division of workers compensation on or before the tenth day after the effective date of the act of an administrative law judge.

K.S.A. 2010 Supp. 44-551(i)(1) states in part:

> All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation.

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the

---

[6] K.S.A. 2010 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[9] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[10] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[11]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a

---

[8] *Id.* at 278.

[9] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[10] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[11] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[12] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[13]

ANALYSIS

An appeal of an ALJ's order to the Board must be filed within 10 days. The ALJ entered his Order on July 11, 2011. Pursuant to K.A.R. 51-18-2(a), the effective date of that order is the day following the date noted on the order. Thus, the effective date of the order is July 12, 2011. Excluding intermediate Saturdays and Sundays as required by K.S.A. 2010 Supp. 44-551(i)(1), the tenth day after July 12, 2011, was July 26, 2011. Claimant filed his Application for Review Before the Workers Compensation Board on July 26, 2011. Therefore, the appeal was timely, and the Board has jurisdiction to review the ALJ's Order.

Claimant had a preexisting left hip condition that included a fusion and metal plate from a 2001 motorcycle accident. Thereafter, claimant walked with a limp. Claimant continued to have symptoms and to seek medical treatment for his hip before going to work for respondent. Claimant alleges he fell from the paver machine, landing in the freshly laid asphalt. The asphalt is heated to approximately 300 degrees. Claimant alleges he suffered burn injuries to his forearms and his left leg, back and right knee were sore. Nevertheless, claimant continued working and did not seek medical treatment. Neither of claimant's coworkers who testified said they saw claimant's fall or were aware of his injuries. Neither Mr. Sanchez nor Mr. Parsons corroborated claimant's testimony, although Mr. Parsons recalled claimant saying he fell off the paver. Claimant did not tell Mr. Parsons that he was injured.

Claimant first sought medical treatment for his alleged injuries on his own on July 26, 2010, with Dr. Curl. He did not tell the doctor that his injuries were work-related. Rather, claimant related his symptoms to the 2001 motorcycle accident. Claimant saw another physician, Dr. Corsolini, on November 12, 2010, at which time claimant learned he had a crack in the metal plate in his hip. Claimant did not tell Dr. Corsolini about a fall at work. When claimant returned to Dr. Curl that same day, he again failed to mention a fall at work on July 1, 2010. Nevertheless, claimant later testified that in his mind, he immediately related the broken plate to his July 1, 2010, fall. Claimant did not return to work with respondent after November 11, 2010. Sometime in December 2010, claimant filed a claim for workers compensation in Missouri. He filed his claim in Kansas on February 7, 2011. Claimant testified he gave respondent notice of his accident on the day it happened. Respondent contends it first received notice of claimant's July 1, 2010, accident in December 2010.

[13] K.S.A. 2010 Supp. 44-555c(k).

The broken plate in claimant's hip was not diagnosed until after the November 8, 2010, incident with the deer. It seems unlikely that if claimant were having significant problems with his hip, back, groin and knee, he would elect to kill and dress a deer. Furthermore, claimant's version of the events on November 8, 2010, was contradicted in significant parts by the testimony of Mr. Herrman. This Board Member does not find claimant's version of events of either July 1, 2010, or November 8, 2010, to be credible. Likewise, this Board Member does not find as credible claimant's testimony that he gave notice of his accident to Mr. Spray on July 1, 2010.

CONCLUSION

(1) Claimant's application for review was timely filed. The Board has jurisdiction of this appeal.

(2) Claimant has failed to prove that he suffered personal injury by accident arising out of and in the course of his employment with respondent on July 1, 2010, and has failed to prove that his current need for medical treatment is related to a July 1, 2010, work-related injury.

(3) Claimant failed to prove he gave notice within 10 days of his alleged July 1, 2010, accident or that just cause exists for his failure to give such notice.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated July 11, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2011.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Brianne Niemann, Attorney for Claimant
Vincent Burnett, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge